

MOTION FILED

NOV 2 1993

No. 93-518

In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,
Petitioner,
v.
CITY OF TIGARD,
Respondent.

**Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION AND RICHARD K.
EHRlich IN SUPPORT OF PETITIONER,
FLORENCE DOLAN**

JOHN M. GROEN
Pacific Legal Foundation
10800 N.E. 8th Street,
Suite 325
Bellevue, Washington 98004
Telephone: (206) 635-0970

RONALD A. ZUMBRUN
* ROBIN L. RIVETT
*Counsel of Record
DEBORAH J. LA FETRA
Of Counsel
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae

In the
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,
Petitioner,
v.
CITY OF TIGARD,
Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE OF PACIFIC LEGAL FOUNDATION AND
RICHARD K. EHRLICH IN SUPPORT OF
PETITIONER, FLORENCE DOLAN**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation and Richard K. Ehrlich respectfully move this Court for leave to file the attached amicus curiae brief in support of petitioner, Florence Dolan. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent City of Tigard has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992).

Richard K. Ehrlich is a property owner who, as a condition for a permit to build condominiums, was required to pay a \$280,000 fee to help finance Culver City's public recreation facilities. Mr. Ehrlich was singled out to pay this fee because the land on which he desired to build condominiums housed a defunct private health club. Additionally, the city required the payment of a \$33,000 fee

to fund its "art in public places" program. This fee not only was assessed in violation of the Takings Clause but also First Amendment Free Speech guarantees. While Mr. Ehrlich is required to subsidize the art, the artist maintains ownership and the city decides what art (and what message) will be displayed. The California Court of Appeal upheld these exactions without requiring a demonstration that they were designed to mitigate any public burden created by Ehrlich's project. *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737 (1993), rev. denied August 26, 1993.¹ Mr. Ehrlich's case represents a California court's misinterpretation of *Nollan's* requirement that an "essential nexus" exists between the public burden caused by the project and the exaction. The misinterpretation of this necessary close relationship (essential nexus) is also the critical issue in Mrs. Dolan's case now before this Court.

Amici seek here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. Mr. Ehrlich's personal experiences will provide a further viewpoint on these issues that may be helpful to this Court.

The present case involves an egregious violation of federal constitutional rights in the guise of local land use regulation. The decision below rests on the principle that local government entities, on the basis of speculation and assumptions, may place onerous conditions on the granting of a building permit without being subjected to judicial scrutiny beyond a "reasonable relationship" test. This principle runs contrary to *Nollan v. California Coastal*

¹ Mr. Ehrlich is currently preparing a petition for writ of certiorari to file in this Court.

Commission, which stands for the proposition that the Constitution requires heightened judicial scrutiny to ensure that conditions on land use permits are "substantially related" to legitimate public interests and that there exists an "essential nexus" between the condition and mitigation of the impacts of the proposed development.

Amici believe the opinion below is in direct conflict with this Court's decision in *Nollan* and other regulatory takings cases. If allowed to stand, the opinion below will constitute a serious setback for individual rights by undermining the constitutional prohibition against taking private property without just compensation. This result would abridge fundamental notions of fairness and equity by unconscionably tipping the constitutional balance in favor of the state's regulatory power over the rights of the individual.

For the foregoing reasons, Pacific Legal Foundation and Richard K. Ehrlich request that their motion to file the amicus curiae brief which follows be granted.

DATED: October __, 1993.

Respectfully submitted,

JOHN M. GROEN
Pacific Legal Foundation
10800 N.E. 8th Street,
Suite 325
Bellevue, Washington 98004
Telephone: (206) 635-0970

RONALD A. ZUMBRUN
* ROBIN L. RIVETT
*Counsel of Record
DEBORAH J. LA FETRA
Of Counsel
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

By _____

ROBIN L. RIVETT

Attorneys for Amici Curiae

TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE	1
OPINION BELOW	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
 I. THE OREGON SUPREME COURT'S ANALYSIS CONFLICTS WITH THE HEIGHTENED SCRUTINY MANDATED BY DECISIONS OF THIS COURT ...	3
A. The Court Below Did Not Apply Heightened Scrutiny to the Pedestrian/Bicycle Pathway Condition	6
B. The Court Below Did Not Apply Heightened Scrutiny to the Floodplain Greenway Condition	7
 II. THE DECISION BELOW CONFLICTS WITH OTHER STATE SUPREME COURTS THAT HAVE FOLLOWED THIS COURT'S MANDATE	9
A. The New York Court Demonstrated Correct Understanding and Analysis of Heightened Scrutiny Under <i>Nollan</i>	9

	Page
B. The Oregon Supreme Court's Decision Conflicts with the New Jersey Court's Correct Statement of Nollan's Heightened Scrutiny	10
C. A California Court Has Similarly Recognized the Heightened Scrutiny Requirement	10
III. THIS CASE INVOLVES IMPORTANT ISSUES OF LAW THAT SHOULD BE RESOLVED BY THIS COURT	12
A. Some Courts Have Created a Pattern of Refusing to Apply the Holding of Nollan	12
B. Policy Considerations Require Strict Adherence to Nollan	14
CONCLUSION	18

TABLE OF AUTHORITIES CITED

	Page
CASES	
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	13
Agin v. City of Tiburon, 447 U.S. 255 (1980)	3
Armstrong v. United States, 364 U.S. 40 (1960)	15
Blue Jeans Equities West v. City and County of San Francisco, 3 Cal. App. 4th 164, cert. denied, ___ U.S. ___, 121 L. Ed. 2d 135 (1992)	13
City and County of San Francisco v. Golden Gate Heights Investment, 14 Cal. App. 4th 1203 (1993), cert. denied, ___ U.S. ___, 1993 WL 323192	13
Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, ___ U.S. ___, 118 L. Ed. 2d 593 (1992)	5-6,8,12-13
Dolan v. City of Tigard, 317 Or. 110, 854 P.2d 437 (1993)	2-3,5-8,14,16-17
Ehrlich v. City of Culver City, 15 Cal. App. 4th 1737 (1993)	13-14

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248 (N.J. 1992), cert. denied, ___ U.S. ___, 122 L. Ed. 2d 370 (1993)	10
Keller v. State Bar of California, 496 U.S. 1 (1990)	13
Lynch v. Household Finance Corporation, 405 U.S. 538 (1972)	14-15
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	passim
Parks v. Watson, 716 F.2d 646 (9th Cir. 1983)	5
Seawall Associates v. City of New York, 542 N.E.2d 1059 (N.Y.), cert. denied, 493 U.S. 976 (1989)	9
Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260 (1991)	10-11
Yee v. City of Escondido, 503 U.S. ___, 118 L. Ed. 2d 153 (1992)	5,13
MISCELLANEOUS	
R. S. Radford, Statistical Error and Legal Error, 21 Loy. L.A. L. Rev. 843 (1988)	17
William A. Falik & Anna C. Shimko, The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California, 39 Hastings L.J. 359 (1988)	5

In the
Supreme Court of the United States

October Term, 1993

FLORENCE DOLAN,
Petitioner,
v.
CITY OF TIGARD,
Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the State of Oregon

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION AND RICHARD K. EHRLICH IN
SUPPORT OF PETITIONER FLORENCE DOLAN**

INTERESTS OF AMICI CURIAE

The interests of amici curiae are set forth in the
preceding motion and are adopted herein.

OPINION BELOW

The opinion of the Oregon Supreme Court is reported at *Dolan v. City of Tigard*, 317 Or. 110, 854 P.2d 437 (1993). The court held, *inter alia*, that when a building permit is conditioned upon dedication of an easement, the condition does not effect a taking of private property if the condition is "reasonably related" to a legitimate state interest. *Id.* at 119. The court below stated that the city's site development review exactions did not effect a taking, even though the city had no site-specific studies or other evidence to show Mrs. Dolan's project would cause the level of burden the exactions were designed to mitigate. *Id.* at 120-21. Disregarding *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the court below ruled that the transportation impacts and storm water runoffs, asserted by the city in its "findings" as being associated with the expansion of the Dolans' store, were reasonably related, respectively, to the requirements to dedicate land for a pedestrian/bicycle pathway and a greenway. *Id.* The court rejected Dolans' contention that the exactions bore no relationship to their specific development because the city had no site-specific studies and it engaged in the generic practice of demanding identical exactions from *all* developments, regardless of size or intensity. *Id.*

STATEMENT OF THE CASE

Florence Dolan owns a plumbing supply store in the City of Tigard, Oregon. She applied to the city for a permit to replace her existing store with a new, expanded, store (a use contemplated by and fully within zoning requirements for the site). The city informed Mrs. Dolan and her late husband, John T. Dolan, they could have their permit on two conditions: First, they would have to dedicate a greenway

easement across a portion of their property abutting Fanno Creek; and second, they would have to dedicate an additional easement adjacent to the greenway easement for a pedestrian/bicycle pathway. The combined easements represent 7,000 square feet (approximately 10%) of Mrs. Dolan's property.

The city's asserted justifications for these conditions were based not on factual findings regarding this proposed project, but on speculation, assumptions, and an overriding goal to acquire the property without using the proper eminent domain procedures. *Dolan*, 317 Or. at 113-14 (majority); and 123, 126 (Peterson, J., dissenting). Nevertheless, the administrative agencies and courts to which the Dolans pleaded for relief denied the Dolans any compensation whatsoever.

REASONS FOR GRANTING THE WRIT

I

THE OREGON SUPREME COURT'S ANALYSIS CONFLICTS WITH THE HEIGHTENED SCRUTINY MANDATED BY DECISIONS OF THIS COURT

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. In *Nollan*, 483 U.S. 825 this Court reaffirmed the bright-line test set forth in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), that a regulatory taking occurs where a regulation does not "substantially advance" a legitimate state interest. *Nollan* explains that in the context of a permit condition, the test is met under these circumstances: first the government must be able to deny the permit outright, 483 U.S. at 835-36, second the "permit condition [must] serve[] the same legitimate police-power

purpose as a refusal to issue the permit," 483 U.S. at 836, and third the permit condition must serve to mitigate the public burden or need created by the project sought to be permitted. *Nollan*, 483 at 838, 849. Therefore, a permit condition must bear an essential nexus to not only a legitimate police power purpose that could have been used to deny the permit in the first place, but to the burden created by the proposed project. *Id.* at 837. The government establishes the essential nexus by demonstrating that a particular project has caused a burden on the community which the specific conditions are designed to ameliorate:

[O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have *required* that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 835 n.3 (citations omitted; emphasis added and in original).

Courts are intended to view infringements on property rights very seriously as the *Nollan* Court warned:

We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination.

Nollan, 483 U.S. at 841. Unless the permit condition serves the same governmental purpose as prohibiting development of the land at all, the building restriction is not a valid regulation of land but "'an out-and-out plan of extortion.'" *Nollan*, 483 U.S. at 837. The heightened scrutiny

requirement also was recently emphasized by this Court in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 167 (1992). Disregarding the plain teaching of this Court in *Nollan* the Oregon Supreme Court declined to apply any meaningful scrutiny to the ordinance at issue. Identifying a legitimate purpose of regulation is only the first step in avoiding a finding of a taking. Equally important is the second step, in which the regulatory body must "demonstrate a specific and logical connection between burdens produced by new development and conditions designed to alleviate such burdens." William A. Falik & Anna C. Shimko, *The "Takings" Nexus--The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 Hastings L.J. 359, 389 (1988) (emphasis added; footnote omitted). Without applying this second step to a given set of facts, a court cannot determine whether the regulation "substantially advances" the legitimate state interest.

Missing from the Oregon Supreme Court's decision is any analysis of whether the City of Tigard would be justified in denying Mrs. Dolan's permits on the basis of increased bicycle or pedestrian traffic or increased need for storm drainage. A bicycle and pedestrian path as well as more storm drainage are presumably legitimate interests of the City of Tigard. However, making Mrs. Dolan contribute to these interests is legitimate only if denial of the permits would be justified on the ground that their project would interfere with these interests.

The court below justifies its minimal analysis by finding that *Nollan* only imposes a "reasonable relationship" standard (rather than a substantial advancement standard) for determining the permissibility of imposing conditions responsive to the impacts of particular developments. *Dolan*, 317 Or. at 119. The court justifies this standard by reference to two Ninth Circuit Court of Appeals' decisions: *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), and *Commercial*

Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 118 L. Ed. 2d 593 (1992). *Parks*, of course, predates *Nollan* and can have no interpretative value with respect to *Nollan*. As discussed *infra* at 12-13, *Commercial Builders* misinterpreted *Nollan* by refusing to acknowledge the enhanced standard of review mandated by this Court's opinion.

A. The Court Below Did Not Apply
Heightened Scrutiny to the
Pedestrian/Bicycle Pathway Condition

In this case, heightened scrutiny will bear out the fact that no nexus (much less an essential one) exists between the city's conditions of a greenway and pedestrian/bicycle pathways and the impacts to be created by Mrs. Dolan's expanded plumbing supply store. The city conducted no study whatsoever to support its conclusions. Instead, the city simply made deductions and assumptions based on its own sense of logic and nothing more. The city's findings stated:

It is reasonable to *assume* that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. ... In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

Dolan, 317 Or. at 113-14 (emphasis added).

The fact that the pathway *could* be used is nothing more than supposing that having a pathway is a good idea and will benefit Mrs. Dolan's customers and employees, as it will benefit every other citizen of the City of Tigard. The findings of fact that the bicycle pathway system "'could offset some of the traffic demand' is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand." *Dolan*, 317 Or. at 127 (Peterson, J., dissenting) (emphasis in original).

Certainly, the City of Tigard could not have denied Mrs. Dolan's permit on the grounds that her customers' and employees' recreation needs are not being met. There is simply no nexus or reasonable relationship between the new development of an enlarged plumbing supply store and its customers' recreational needs. What the city should have shown--but did not--was that it could have denied Mrs. Dolan's permit on the ground that her project would increase traffic and the bicycle/pedestrian pathway would do no more than alleviate the burden caused by Mrs. Dolan's project. So far, the City of Tigard's articulations have shown a presumed connection which is nothing more than "an exercise in cleverness and imagination." *Nollan*, 483 U.S. at 841.

B. The Court Below Did Not Apply
Heightened Scrutiny to the
Floodplain Greenway Condition

In regard to the floodplain dedication, the court below relied on the city's findings that

[t]he increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods

of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.

Dolan, 317 Or. at 114. This finding only acknowledges that the City of Tigard has an existing problem with this drainage basin and the enlarged store and parking lots' increased surface area *could* add to this problem. As Justice Peterson noted in dissent, the contribution of this project to runoff may be only a "thimbleful." *Dolan*, 317 Or. at 128 (Peterson, J., dissenting). The city must show that the granting of the permit probably will create specific problems, burdens, or conditions that previously did not exist. The city must then show that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. General statements of concern about increased traffic or public safety are insufficient to support, as permissible regulation, what otherwise would be a taking. *Dolan*, 317 Or. at 123 (Peterson, J., dissenting).

In the present case, the city's desires to construct a greenway and bike trails are totally unrelated to any burden created by Mrs. Dolan's proposed expansion of her plumbing supply store. When Tigard's exactions are subjected to the heightened scrutiny required by *Nollan*, it is apparent that Tigard's actual purpose is identical to that of the condition demanded by the California Coastal Commission: "[T]he obtaining of an easement to serve some valid governmental purpose, but without payment of compensation." *Nollan*, 483 U.S. at 837. The government must show more than a theoretical nexus.

II

THE DECISION BELOW CONFLICTS
WITH OTHER STATE SUPREME COURTS
THAT HAVE FOLLOWED THIS COURT'S MANDATE

As opposed to the Oregon Supreme Court's decision, *Nollan's* requirement of heightened scrutiny in regulatory takings cases has been recognized and correctly applied by state courts faced with federal takings claims brought under the Fifth and Fourteenth Amendments.

A. The New York Court Demonstrated
Correct Understanding and Analysis
of Heightened Scrutiny Under *Nollan*

The New York Court of Appeals struck down a law requiring the imposition of a monetary exaction on hotel owners who wanted to stop using their hotels as single room occupancy, low rent housing. The court held:

[Regulatory takings challenges require] "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships" as articulated in *Nollan*.

Seawall Associates v. City of New York, 542 N.E.2d 1059, 1068 (N.Y.), *cert. denied*, 493 U.S. 976 (1989). Analyzing the law, the court noted that the city's asserted nexus between the obligation placed on the property owners and the state interest was "indirect at best and conjectural." *Id.* at 1069. The conjectural nature of the connection was so tenuous that the court found it could not justify singling out the property owners to bear the costs of curing a larger societal ill--in this case, homelessness. *Id.* In the case now before this Court, the speculative musings of the City of Tigard are insufficient to demonstrate the required essential nexus.

B. The Oregon Supreme Court's Decision
Conflicts with the New Jersey Court's
Correct Statement of Nollan's Heightened Scrutiny

The New Jersey Supreme Court has also explicitly recognized the heightened scrutiny requirement of *Nollan*:

[T]he United States Supreme Court has acknowledged that the "rationality" standard determinative of substantive-due-process challenges to State regulation is less stringent than the "takings" standard, which requires that the taking "substantially advance" the State interest to be achieved.

In the Matter of the "Plan for Orderly Withdrawal from New Jersey" of Twin City Fire Insurance Company, 609 A.2d 1248, 1259 (N.J. 1992), cert. denied, ___ U.S. ___, 122 L. Ed. 2d 370 (1993) (citing *Nollan*, 483 U.S. 825).

C. A California Court Has
Similarly Recognized the
Heightened Scrutiny Requirement

Even California--whose courts were singled out in *Nollan* as particularly hostile to property rights¹--has produced a decision acknowledging and applying the enhanced standard that *Nollan* requires.

Nollan ... changed the standard of constitutional review in takings cases. Whether the new standard is described as "substantial relationship," or "heightened scrutiny," it is clear the rational basis test ... no longer controls.

Surfside Colony, Ltd. v. California Coastal Commission, 226 Cal. App. 3d 1260, 1270 (1991) (footnotes omitted).

¹ *Nollan*, 483 U.S. at 839.

This California Court of Appeal decision provides a good example of a court properly applying the *Nollan* test to conditions imposed on a permit to develop a revetment on oceanfront property. The plaintiff challenged the dedication of an easement for public access along the beach. In evaluating these conditions, the court reviewed generic studies relied on by the Coastal Commission which indicated that such revetments "typically exacerbate erosion of the beach in front of them." *Surfside Colony*, 226 Cal. App. 3d at 1265. Nevertheless, the Court of Appeal concluded that the dedication condition effected a taking of the property because

the Commission had no evidence at all establishing *this* revetment would cause erosion at *this* beach.

We must therefore conclude no substantial evidence exists to justify a "nexus" between the revetment and the public access requirement. Under *Nollan*, the access requirement must be deemed a "taking" of Colony's property.

Id. at 1269 (emphasis added). The court in *Surfside* understood that *Nollan* requires far more than an assumed relationship between the condition and the need created by the development. Because the "nexus" between the actual development and the condition must be substantial, the court concluded that "[w]ithout any site-specific evidence supporting the Commission's decision, we cannot say the Commission had "substantial evidence" justifying the need for an easement over Colony's property." *Id.* at 1272.

III

THIS CASE INVOLVES IMPORTANT
ISSUES OF LAW THAT SHOULD BE
RESOLVED BY THIS COURT

A. Some Courts Have Created a Pattern
of Refusing to Apply the Holding of *Nollan*

Recently, some lower courts especially the Ninth Circuit have blatantly misinterpreted *Nollan*. For example, in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, instead of comparing the permit condition (a fee to fund low income housing) and the applicants' projects (commercial buildings), the Ninth Circuit Court of Appeals deferred to the city "because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve" (i.e., "expanding low income housing"). *Id.* at 873.

The relationship which that court found sufficient is also a departure from *Nollan*. As previously noted, *Nollan* requires courts to find a constitutional nexus between the permit condition and the applicant's proposed project to determine whether the condition is truly remedial of adverse impacts caused by the project. Yet, the *Commercial Builders* court wrote:

"Prior to *Nollan*, other federal courts ... upheld ordinances placing restrictions or conditions upon development where the ordinances were reasonably related to legitimate public purposes.

....

As a threshold matter, we are not persuaded that *Nollan* materially changes the level of scrutiny we must apply to this Ordinance."

Commercial Builders, 941 F.2d at 874.

In an even more troubling ruling, one California court (attempting to reconcile *Commercial Builders* with the fact that *Nollan* does require heightened scrutiny) proclaimed that *Nollan* does not apply to regulatory takings cases at all. *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164, cert. denied, ___ U.S. ___, 121 L. Ed. 2d 135 (1992). In *City and County of San Francisco v. Golden Gate Heights Investment*, 14 Cal. App. 4th 1203 (1993), cert. denied, ___ U.S. ___, 1993 WL 323192, the California Court of Appeal also characterized *Nollan* as a physical takings case. *Id.* at 1209. In support it cited *Blue Jeans Equities* and *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d at 161, which found the exact opposite.

The California courts, with the exception of *Surfside Colony*, discussed *supra*, have continued unabated their pattern of misinterpretation of *Nollan*'s requirements. Amicus Richard Ehrlich has been the victim of one such opinion which managed to find a justification for the imposition of a \$280,000 recreation fee and a \$33,000 arts fee.² *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737

² The arts fee is particularly egregious in its twofold attack on individual constitutional rights. Not only does it violate Mr. Ehrlich's guarantee of just compensation for a regulatory taking, but it also violates Mr. Ehrlich's right of free speech by turning him into a private endowment for the arts. Under the First Amendment, Ehrlich has the right to refuse to subsidize artistic speech with which he disagrees. *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977) ("our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters--to take a nonexhaustive list of labels--is not entitled to full First Amendment protection" (footnote omitted)); *Keller v. State Bar of California*, 496 U.S. 1, 13 (1990).

(1993). In *Ehrlich*, the inherent vice of the California Court of Appeal's decision is its conclusion that conditions requiring exactions are acceptable if they (1) advance a legitimate governmental interest and (2) leave a property owner with economically viable use. In reaching this conclusion, the court did not require any showing that the exaction was designed to mitigate any public burden created by the project itself. Indeed, the court stated that the "fee was not imposed as a condition relating to the development project's burden on the community for increased community services," but only because of a "benefit conferred" and the burden from the loss of nonexistent recreational facilities. *Id.* at 1749-50. This reasoning, and the necessary conclusion resulting from it, directly conflict with this Court's mandate in *Nollan*.

The aberrant decisions discussed above, including *Dolan*, have created a conflict among state jurisdictions and the United States Supreme Court on this vital issue. Some courts even refuse to apply this Court's requirement of heightened scrutiny. The pattern demonstrated by those decisions underscore the need for this Court to grant the writ of certiorari sought by Mrs. Dolan to resolve conflicts among the jurisdictions over the heightened scrutiny requirement set forth in *Nollan*.

B. Policy Considerations Require Strict Adherence to Nollan

The right to make reasonable use of property, free from extorsive governmental demands, involves a matter of individual liberty and a basic civil right which should be jealously guarded by the courts.

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation ... is in truth a "personal" right In fact, a fundamental interdependence

exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corporation, 405 U.S. 538, 552 (1972).

The importance of this case is found both in the breadth of its impact and the nature of the issues raised. Even beyond its clear conflict with the standards laid down by this Court in *Nollan*, the city's actions violate the Takings Clause by requiring petitioner alone to bear what should rightfully be a general public burden. In addition to examining the nature of the state action embodied in land use regulations, and its economic impact on property owners, this Court has assigned unique significance to this question of fundamental equity. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835 n.4 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Any presumed benefits of the pedestrian/bicycle pathway and greenway would accrue to the community as a whole. It follows as a general principle of constitutional law that the costs of constructing these pathways and greenways, including the cost of acquiring the right of way, must be financed out of general public revenues. The city is prohibited under the Fifth and Fourteenth Amendments of the United States Constitution from requiring individual property owners to bear the costs of its land acquisition program.

In *Nollan*, the Coastal Commission wanted access to the Nollans' beach as part of a comprehensive program to provide continuous public access along Faria Beach as the adjacent lots underwent development or redevelopment. *Nollan*, 483 U.S. at 841. If "Fanno Creek" were substituted

for "Faria Beach" and "storm water management and greenway purposes" for "continuous public access," the parallels between *Nollan* and *Dolan* become blatant. This Court's response to the Coastal Commission's justification was that California "is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose,' ... but if it wants an easement across the Nollans' property, it must pay for it." *Nollan*, at 841-42. Oregon apparently needs the same message spelled out for it.

With respect to takings jurisprudence, courts struggle with two essentially opposing tendencies. First is a tendency to recognize the legitimacy of attempts by government to regulate property in ways that once might have been unthinkable. *Dolan*, 317 Or. at 128 (Peterson, J., dissenting). The second tendency (a corollary of the first) is for state and local governments to attempt to further particular goals by conditioning the uses of private property. Property owners are denied their rights to build unless they "dedicate" some portion of their property to support the particular government program. Governments, therefore, face strong temptations, particularly in times of limited tax revenues, to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects. As Justice Peterson eloquently stated in his dissent:

The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

... The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a *potential* increase in intensity; they must establish more than *some* increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Dolan, 317 Or. at 129 (Peterson, J., dissenting) (emphasis added).

The rejection of *Nollan*'s heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. See R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether or not individual property rights will be protected against predatory and confiscatory regulations.

The ruling in *Nollan* indicates that this Court believes the issue presented here is important enough to justify a grant of review. Although *Nollan* explicitly set a heightened standard of review which must be applied to exactions imposed on building permits, lower courts have deliberately circumvented the language in *Nollan* to come to results that cannot be harmonized with that case. For the benefit of those courts which have yet to acknowledge and apply the required heightened scrutiny in takings cases, this case presents this Court with the opportunity to clarify this area of the law. Thus, the Court should grant review to settle an

important question of federal constitutional law impacting a significant segment of the population.

CONCLUSION

In the post-*Nollan* world, a clear pattern has emerged in which some state and federal courts have employed legal trappings and misanalysis to undermine the landmark *Nollan* decision. The facts here present an excellent opportunity for the Court to finish the analysis begun in *Nollan*. Review by this Court is necessary to resolve the conflicts created by the Oregon Supreme Court's decision in this case and to alter the current trend of decisions away from the mandates of this Court's decisions. Amici curiae respectfully urge this Court to grant the petition for writ of certiorari and reverse the judgment of the Oregon Supreme Court.

DATED: October, 1993.

Respectfully submitted,

JOHN M. GROEN
Pacific Legal Foundation
10800 N.E. 8th Street,
Suite 325
Bellevue, Washington 98004
Telephone: (206) 635-0970

RONALD A. ZUMBRUN
* ROBIN L. RIVETT
*Counsel of Record
DEBORAH J. LA FETRA
Of Counsel
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae